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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GIOVANY SEGOVIA, Defendant and Appellant.	B300181 (Los Angeles County Super. Ct. No. VA149697)

APPEAL from an order of the Superior Court of Los Angeles County, Debra Cole-Hall, Judge. Reversed.

Nicholas Seymour, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Giovany Segovia of taking or driving a vehicle without the owner's consent in violation of Vehicle Code[1] section 10851, subdivision (a). In a bifurcated trial, the court found true an allegation that defendant had been previously convicted of the same offense (Pen. Code, § 666.5, subd. (a)) and had served a prior prison term within five years of committing the current offense (*id.*, former § 667.5, subd. (b)). The court sentenced defendant to four years to be served in county jail and stayed the enhancement for the prison prior.

Defendant contends (1) the evidence is insufficient to support the felony conviction because there was no evidence of the value of the stolen vehicle he was driving; (2) the court failed to instruct the jury as to (a) the value of the stolen vehicle and (b) whether there had been a substantial break between the theft and defendant's driving of the vehicle; and (3) he is entitled to the retroactive application of a recent amendment to Penal Code section 667.5, subdivision (b).

We agree with defendant and the Attorney General that an instructional error was prejudicial and requires reversal and that defendant is entitled upon any resentencing to the benefit of the amendment to Penal Code section 667.5, subdivision (b). We disagree with defendant that the evidence was insufficient to support a conviction on the charged crime.

FACTUAL AND PROCEDURAL SUMMARY

On January 15, 2019, at approximately 4:00 p.m., C.P., a handyman, parked his employer's van outside a job site in Paramount and locked the van. He left his wallet, a work identification card, and other personal belongings in the van.

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[1] Unless otherwise indicated, subsequent statutory references are to the Vehicle Code.

He returned between 30 and 45 minutes later to find the van missing. He immediately reported the theft to police.

At 5:30 p.m. that day, a Los Angeles County Sheriff's Deputy spotted the stolen van, followed it for several blocks, then initiated a traffic stop. Defendant pulled into a parking lot and fled into a shopping mall. Other sheriff's deputies apprehended defendant inside the mall. He possessed C.P.'s wallet and work identification card. The van's ignition switch had been removed and wires were protruding from the steering column.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends that the evidence is insufficient to support his felony conviction under section 10851 because there was no evidence of the value of the stolen van. The Attorney General does not dispute the absence of evidence of the van's value, but argues that such evidence is not required to establish a violation of section 10851 based on the act of driving a stolen vehicle after the theft is complete. We agree with the Attorney General.

A person violates section 10851 by "driv[ing] or tak[ing] a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle." (§ 10851, subd. (a).) By its terms, the crime is a wobbler—one that can be punished as a felony or a misdemeanor. (*People v. Bullard* (2020) 9 Cal.5th 94, 100, fn. 1 (*Bullard*); *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853 (*Gutierrez*).) The statute does not mention the value of the vehicle taken or driven.

Section 10851 can be violated in various ways: (1) by taking a vehicle from the owner with the intent to deprive the owner

permanently of title or possession (vehicle theft); (2) by taking the vehicle from the owner with the intent to deprive the owner *temporarily* of title or possession (joyriding); or (3) after a theft of the vehicle is complete, by driving the vehicle with the intent to deprive the owner permanently or temporarily of title or possession (posttheft driving). (*People v. Garza* (2005) 35 Cal.4th 866, 871, 876 (*Garza*); *People v. Jackson* (2018) 26 Cal.App.5th 371, 377 & fn. 5; *Gutierrez*, *supra*, 20 Cal.App.5th at p. 854.) Taking the vehicle can, of course, be accomplished by driving the vehicle away from the owner. (*Bullard*, *supra*, 9 Cal.5th at p. 108 ["cars are commonly taken by driving them away"].) *Posttheft* driving, however, as a distinct basis for criminal liability, requires proof of a " ' "substantial break" between the taking and the driving.' " (*People v. Lara* (2019) 6 Cal.5th 1128, 1136 (*Lara*).)[2]

These distinctions were given "new relevance" by the passage of Proposition 47 in 2014. (*Bullard*, *supra*, 9 Cal.5th at p. 103.) Proposition 47 added Penal Code section 490.2, which provides in part: "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (Pen. Code, § 490.2, subd. (a).) Our Supreme Court has applied this section to violations of section 10851 committed by theft (taking property with the intent permanently to deprive the owner thereof) (*People v. Page* (2017) 3 Cal.5th 1175, 1182–1183 (*Page*)) and joyriding (taking property with the intent temporarily to deprive the owner thereof) (*Bullard*,

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[2] Our Supreme Court has declined to establish a "precise demarcation point" where a "significant break" occurs for purposes of section 10851, but has suggested that it may occur "when the driving is no longer part of a ' "continuous journey away from the *locus* of the theft" ' or "when the taker reaches a place of temporary safety." (*Garza*, *supra*, 35 Cal.4th at pp. 879—881.)

supra, 9 Cal.5th at p. 109). Thus, violations of section 10851 committed in these ways are punishable as felonies only if the value of the vehicle taken is more than $950.

In applying Proposition 47, the Supreme Court has maintained the distinction between violations of section 10851 based on taking a vehicle and violations based on posttheft driving. In *Bullard*, the court recently summarized "Proposition 47's substantive effect on section 10851 . . . as follows: Except where a conviction is based on posttheft driving (i.e., driving separated from the vehicle's taking by a substantial break), a violation of section 10851 must be punished as a misdemeanor theft offense if the vehicle is worth $950 or less." (*Bullard*, *supra*, 9 Cal.5th at p. 110.) Stated differently, where a conviction under section 10851 is based on posttheft driving, punishment is meted out without regard to Proposition 47 or the value of the vehicle. (See *Lara*, *supra*, 6 Cal.5th at p. 1136 ["a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value"]; *Page*, *supra*, 3 Cal.5th at p. 1189 [Proposition 47 applies to convictions "*based on* theft rather than on posttheft driving"]; *Gutierrez*, *supra*, 20 Cal.App.5th at pp. 855–856 [the value of the vehicle is not an element of a felony offense of posttheft driving]; *People v. Morales* (2019) 33 Cal.App.5th 800, 807 (*Morales*) [posttheft driving is not a theft offense and therefore "is not touched by the plain meaning of Penal Code section 490.2"].)

Defendant argues that requiring a $950 value threshold for felony violations of section 10851 committed by taking a vehicle but not for violations committed by posttheft driving would produce absurd results and violate equal protection principles. The Court of Appeal in *Morales* addressed and rejected these arguments (*Morales*, *supra*, 33 Cal.App.5th at pp. 806–809), and we agree with its analysis and conclusions on these issues.

Based on the foregoing, a conviction under section 10851 that is based on taking the vehicle requires proof that the vehicle is valued at more than $950 to be punished as a felony; a conviction for violating the same statute based on posttheft driving, however, may be punished as a felony even in the absence of evidence of the vehicle's value. Thus, the absence of evidence of the van's value in this case is no impediment to the judgment if the jury's verdict was based on posttheft driving. That issue requires an examination of the jury instructions, to which we now turn.

B. *Instructional Errors*

Defendant contends that the court erroneously instructed the jury in two ways: (1) as to a taking theory of violating section 10851, failing to instruct that the stolen van had a value of more than $950; and (2) as to a posttheft driving theory, failing to instruct that there must be a substantial break between the theft and the driving. The Attorney General concedes the errors and agrees that the second error is prejudicial. We agree.

As to the elements of section 10851, the court instructed the jury as follows: "The defendant is charged with unlawfully driving or taking of a motor vehicle in violation of . . . section 10851. To prove the defendant is guilty of this crime[,] the People must prove that" (1) "[t]he defendant took or drove someone else's vehicle without the owner's consent"; and (2) "[w]hen the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time." The jury instructions thus permitted the jury to convict defendant based on taking the car—i.e., committing theft—as well as driving the car after the theft was complete.

As explained in the preceding part, as to an unlawful taking of the vehicle, the jury was required to find that the vehicle had a value of more than $950 in order for the crime to be punished

as a felony. The court's instruction, however, included no such requirement. The Attorney General concedes this error, but argues that to the extent the instructions permit a felony conviction based on posttheft driving, the instruction is legally correct. The error, the Attorney General further argues, is thus "alternative-theory error"; that is, the trial court instructed the jury on two theories of guilt, one of which is legally correct and one legally incorrect. (See *People v. Aledamat* (2019) 8 Cal.5th 1, 13.) Such errors are harmless if the record establishes beyond a reasonable doubt that the jury relied on the correct legal theory. (*Ibid.*)

The Attorney General asserts that the error is harmless under this standard based on the prosecutor's opening statement and closing argument. During opening statement, the prosecutor told the jury: "I want to be clear. We're not saying that the defendant is the one who went to [C.P.]'s place of work and actually broke into the car and took it. We don't know that. We don't know who took it. For the purposes of this trial, we don't really much care because the evidence will show we've charged the defendant with driving a car without the owner's consent. He drove a stolen car without the owner's consent. That's what we charged him with and what the evidence will show he [did]."

The prosecutor reiterated this theory in his closing argument: "This is a one-count case. We've charged the defendant with one crime and one crime only, that's driving a car without the consent of the owner." The prosecutor referred to the first element in the jury instruction—that "the defendant took or drove someone else's car without the owner's consent"—and told the jury: "I told you this at the beginning of this trial and I'll tell you again now, I'm going to make [that] requirement . . . even easier. We're not proceeding on a take theory. We don't know who actually took the car. We don't have evidence of that; we don't care. We're going on a driving

theory. Did the defendant drive the car without the owner's consent. That's [the first] requirement."

If the instruction regarding posttheft driving of the stolen vehicle was correct, we might agree with the Attorney General. As the Attorney General concedes in a separate part of his brief, however, even the instruction on posttheft driving was incomplete. Specifically, liability under section 10851 based on posttheft driving requires a finding that a "substantial break" occurred between the theft and the defendant's driving of the stolen vehicle. (*Lara*, *supra*, 6 Cal.5th at p. 1137; *People v. Strong* (1994) 30 Cal.App.4th 366, 375–376.) The jury was not instructed on this requirement and the error requires reversal unless we can conclude beyond a reasonable doubt that the jury would have found such a break if it had been properly instructed. (See *Neder v. United States* (1999) 527 U.S. 1, 15.)

We cannot conclude that the error is harmless. The evidence showed that the vehicle may have been missing for as little as 45 minutes and, based on that relatively short period of time, a properly-instructed jury could reasonably have concluded that there had been no substantial break since the theft of the vehicle. Therefore, even if the Attorney General is correct that the prosecutor had effectively limited the jury's consideration of the evidence to the posttheft driving theory of the case, the failure to instruct as to the substantial break requirement requires reversal.

Although the erroneous instructions require reversal, the jury's verdict nevertheless establishes defendant's guilt of, at least, a misdemeanor violation of section 10851. In light of the instructions and the evidence, the jury's verdict necessarily establishes that defendant, with the requisite intent, either (1) took the van (of unknown value) and had been driving it without a substantial break since the theft, or (2) regardless of whether he took the van and regardless of its value, he was driving it after a

substantial break since the theft. Under either scenario, defendant is guilty of violating section 10851. Under the first scenario, however, the crime cannot be punished as a felony (because of the absence of evidence of the van's value), but can be punished as a misdemeanor. (Pen. Code, § 490.2, subd. (a).) After remand, therefore, the prosecution may, in lieu of retrying defendant on the charge, elect to accept a reduction of the felony conviction to a misdemeanor. (See *Gutierrez*, *supra*, 20 Cal.App.5th at pp. 849, 863.)

C. *Post-judgment Amendment to Penal Code Section 667.5, Subdivision (b).*

The trial court imposed and stayed a one-year sentence enhancement under Penal Code section 667.5, subdivision (b). At the time defendant was sentenced, that statute required a one-year sentence enhancement for prior prison terms under certain circumstances. After defendant's sentencing, the Legislature amended the statute to limit the enhancement to cases involving prior prison terms for sexually violent offenses, of which defendant has none. Defendant contends that he should be entitled to the benefit of an amendment. We agree. As the Attorney General concedes, the amendment is retroactive as to cases not yet final and defendant is entitled to the benefit of the new law. (See *People v. Winn* (2020) 44 Cal.App.5th 859, 872–873.) Because we reverse the judgment, the enhancement is necessarily reversed. If defendant is retried or resentenced, the court shall not include the enhancement under Penal Code section 667.5, subdivision (b).

DISPOSITION

The judgment is reversed. On remand, the People may elect to accept a reduction of the conviction to a misdemeanor and to have the court resentence defendant in accordance with that election or retry defendant for a felony violation of Vehicle Code section 10851.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

SINANIAN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.